

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALIAKSANDR KAPTYUG,) CASE NO. C09-1855-JLR-MAT
)
Petitioner,)
)
v.) REPORT AND RECOMMENDATION
)
A. NEIL CLARK, Field Office Director, U.S.)
Immigration and Customs Enforcement,)
)
Respondent.)
_____)

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Aliaksandr Kaptyug, proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, which challenges his detention by the U.S. Immigration and Customs Enforcement (“ICE”) at the Northwest Detention Center in Tacoma, Washington. (Dkt. No. 6.) He requests that this Court order his release from custody on conditions or reasonable bond, arguing that “such custody violates the due process rights of the Petitioner.” *Id.* at 1. Respondent has filed a motion to dismiss, arguing that petitioner is not entitled to a bond hearing or to release because he is subject to mandatory detention under Section 236(c) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1226(c), pending

01 the completion of his removal proceedings. (Dkt. No. 10.)

02 Having carefully reviewed the entire record, I recommend that respondent's motion to
03 dismiss (Dkt. 10) be GRANTED, and that this matter be DISMISSED with prejudice.

04 II. BACKGROUND AND PROCEDURAL HISTORY

05 Petitioner is a native and citizen of Belarus, who was admitted to the United States on
06 June 23, 2000, as a refugee. (Administrative Record ("AR") L8-9.) He subsequently
07 adjusted his status to lawful permanent resident. (AR L11-19.)

08 On January 24, 2006, petitioner was convicted in King County Superior Court of a
09 Violation of the Uniform Controlled Substances Act ("VUSCA"), and was sentenced to ten
10 days imprisonment and twelve months probation. (AR R201.) On July 16, 2006, petitioner
11 was convicted in King County Superior Court of possession of stolen property, and was
12 sentenced to 365 days imprisonment. (AR R165.) On May 6, 2009, petitioner was convicted
13 in Edmonds Municipal Court of theft in the third degree, and was sentenced to 365 days
14 imprisonment. (AR R144.)

15 On November 2, 2009, petitioner was transferred from the Renton City Jail directly into
16 ICE custody. (AR R172, R176). ICE served him with a Notice to Appear, placing him in
17 removal proceedings and charging him as subject to removal from the United States pursuant to
18 INA § 237(a)(2)(B)(i), for having been convicted of a violation relating to a controlled
19 substance; INA § 237(a)(2)(A)(ii), for having been convicted of two crimes involving moral
20 turpitude; and INA § 237(a)(2)(A)(iii), for having been convicted of an aggravated felony as
21 defined in INA § 101(a)(43)(F). (AR L33-35.) ICE made an initial custody determination to
22 mandatorily detain petitioner under INA § 236(c) because he had been convicted of an

01 aggravated felony and was ineligible for release from custody pending completion of his
02 removal proceedings. (AR L23.) Petitioner's removal proceedings remain pending before
03 the Immigration Judge ("IJ").

04 On December 30, 2009, petitioner filed the instant habeas petition challenging his
05 continued detention. (Dkt. No. 6.) On February 22, 2010, respondent filed a return and
06 motion to dismiss. (Dkt. No. 10.) On February 23, 2010, petitioner filed an amended habeas
07 petition which appears identical to his first habeas petition. (Dkt. No. 13.) Petitioner did not
08 file a response to respondent's motion to dismiss.

09 III. DISCUSSION

10 Section 236(c) of the INA states that "[t]he Attorney General *shall* take into custody any
11 alien who" is deportable from the United States because he has been convicted of certain crimes
12 specified in the provision. INA § 236(c)(1)(B), 8 U.S.C. § 1226(c)(1)(B)(emphasis added).
13 Unlike non-criminal aliens who are detained under INA § 236(a), criminal aliens detained
14 under INA § 236(c) are not entitled to a bond hearing and are not provided the opportunity to
15 show that their detention is unnecessary because they are not a danger to the community or a
16 flight risk. *See Casas-Castrillon v. DHS*, 535 F.3d 942, 946 (9th Cir. 2008).

17 In *Demore v. Kim*, 538 U.S. 510, 531, 123 S. Ct. 1708, 155 L. Ed. 2d 724 (2003), the
18 Supreme Court held that "Congress justifiably concerned that deportable criminal aliens who
19 are not detained continue to engage in crime and fail to appear for their removal hearings in
20 large numbers, may require that persons such as respondent be detained for the brief period
21 necessary for their removal proceedings." *Demore*, 538 U.S. at 513. The Court further held
22 that "[d]etention during removal proceedings is a constitutionally permissible part of that

process.” *Id.* at 531.

In the present case, ICE charged petitioner with being removable from the United States for having been convicted of an aggravated felony, which is defined to include a conviction for “a theft offense . . . for which the term of imprisonment [is] at least one year.” INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G); INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). Petitioner was convicted of possession of stolen property and theft in the third degree under Washington law, and was sentenced to 365 days incarceration. Thus, petitioner falls squarely within the group of criminal aliens described in INA § 236(c)(1)(B) for whom detention is mandatory during removal proceedings.

Petitioner argues that he is entitled to release on bond under the Ninth Circuit’s decisions in *Casas-Castrillon*, 535 F.3d at 942; *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008). However, as respondents argue, the authorities cited by petitioner do not apply to the facts of his case.

Section 236 governs the arrest, detention, and release of aliens “pending a decision on whether the alien is to be removed from the United States.” INA § 236(a), 8 U.S.C. § 1226(a). Once removal proceedings have been completed, the detention and release of aliens shifts to Section 241. The determination of when an alien becomes subject to detention under Section 241 rather than Section 236 is governed by Section 241(a)(1), which provides:

The removal period begins on the latest of the following:

- (i) The date the order of removal becomes administratively final.
- (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court’s final order.

01 (iii) If the alien is detained or confined (except under an immigration process),
02 the date the alien is released from detention or confinement.

03 8 U.S.C. § 1231(a)(1)(B).

04 In *Prieto-Romero*, the alien had filed a Petition for Review of the BIA's order affirming
05 the removal order against him and the Ninth Circuit had ordered a stay of removal pending
06 judicial review. *Prieto-Romero*, 534 F.3d at 1053. The Ninth Circuit held that while
07 *Prieto-Romero*'s appeal was pending, the statutory authority to detain him fell under INA §
08 236(a). *Prieto-Romero*, 534 F.3d at 1059. The Court concluded that *Prieto-Romero* was not
09 entitled to a bond hearing, however, because he had already received three bond hearings and
10 had been granted release on bond. *Id.* at 1066.

11 Similarly, in *Casas-Castrillon*, the Ninth Circuit considered whether the government
12 may detain an alien under INA § 236(c) pending judicial review of a final order of removal
13 without providing him with an opportunity to challenge his detention before an Immigration
14 Judge. *Casas-Castrillon*, 535 F.3d at 942. The Ninth Circuit found that once proceedings
15 before the BIA are completed, the authority to detain criminal aliens shifts from INA § 236(c)
16 to INA § 236(a). *See Casas-Castrillon*, 535 F.3d at 947-48. The Court concluded that he was
17 entitled to a bond hearing before an Immigration Judge. *Casas-Castrillon*, 535 F.3d at 951-52.

18 Here, petitioner's order of removal is not yet administratively final because it remains
19 pending before the IJ. *See* INA § 241(a)(1)(B)(i), 8 U.S.C. § 1231(a)(1)(B)(i). Thus, unlike
20 the aliens in *Casas-Castrillon* and *Prieto-Romero* who were detained pending Ninth Circuit
21 review, petitioner continues to be detained under INA § 236(c) until his immigration
22 proceedings have been completed. *See* INA § 241(a)(1)(B)(i); *see also* INA § 101(47)(B).

01 Accordingly, petitioner is not entitled to a bond hearing or release from mandatory detention.

02 IV. CONCLUSION

03 For the foregoing reasons, I recommend that respondent's motion to dismiss be
04 GRANTED, and that this matter be DISMISSED with prejudice. A proposed Order
05 accompanies this Report and Recommendation.

06 DATED this 26th day of April, 2010.

07 

08 Mary Alice Theiler
09 United States Magistrate Judge
10
11
12
13
14
15
16
17
18
19
20
21
22